STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY EGELER, Personal Representative for the Estate of DOROTHY EGELER, Deceased, Plaintiff-Appellee, v BRADFORD WYLIE, M.D., and CHELSEA AREA PRIMARY CARE, P.L.L.C., Defendants-Appellants.	UNPUBLISHED March 19, 2009 No. 280659 Washtenaw Circuit Court LC No. 06-000014-NH

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

In this medical negligence action, defendants appeal as of right the jury trial verdict in favor of plaintiff, the trial court's award of non-economic damages, attorney fees, and costs, and the trial court's denial of defendants' motion for new trial. We affirm in part, vacate in part, and remand for an evaluation of the award of attorney fees and costs.

I. Facts and Procedural History

In 2003, Dorothy Egeler sought evaluation for double vision and other eye problems and was ultimately diagnosed with myasthenia gravis. Myasthenia gravis is a neurological autoimmune disease that affects muscle function. In normal muscle function, a nerve activates the muscle by releasing a chemical called acetylcholine, which travels from the nerve to a receptor at the muscle, causing the muscle to activate. Myasthenia gravis occurs when the body produces antibodies that block the muscle receptors from being able to accept acetylcholine. This causes muscle weakness. The finely tuned muscles of the eye are often the muscles first affected with the onset of myasthenia gravis. The condition typically progresses from ocular to generalized myasthenia gravis, and the patient can develop problems breathing, swallowing, speaking, and moving arms and legs.

On February 18, 2005, Mrs. Egeler complained of coughing and congestion and presented to defendant Chelsea Area Primary Care, P.L.L.C. Because Mrs. Egeler's primary physician, Dr. Thomas O'Brien, did not see patients on Fridays, defendant Dr. Bradford Wylie saw her. Dr. Wylie reviewed Mrs. Egeler's chart and was aware that she had been diagnosed with ocular myasthenia gravis. Dr. Wylie diagnosed Mrs. Egeler with acute bronchitis with significant congestion. He was unsure whether Mrs. Egeler's symptoms were bacterial or viral

in origin, but did not believe that it was safe to leave a potential bacterial respiratory infection untreated while awaiting test results to confirm the diagnosis. As such, he prescribed an antibiotic for Mrs. Egeler. He prescribed Ketek, a broad-spectrum antibiotic, and gave Mrs. Egeler a sample package containing several days' worth of pills.

Upon returning home, and within about a half hour after taking the antibiotic, Mrs. Egeler experienced acute respiratory failure and collapsed. Mrs. Egeler's husband, Raymond Egeler, called 911. Medical personnel arrived and were eventually able to resuscitate Mrs. Egeler, but by then she had suffered severe anoxic brain injury due to lack of sufficient oxygen to the brain. Mrs. Egeler was rendered comatose and unable to breathe on her own. She remained on a ventilator for nine days. On February 27, 2005, after doctors concluded that her condition would not improve, Mrs. Egeler was removed from life support and passed away.

Thereafter, plaintiff Timothy Egeler, Mrs. Egeler's son, initiated this medical negligence action alleging wrongful death. Plaintiff's theory of the case is that Dr. Wylie was negligent in prescribing Ketek to Mrs. Egeler because it is contraindicated in patients with myasthenia gravis, and there were other antibiotics he could have prescribed that are not contraindicated. According to the product label, Ketek can exacerbate the symptoms of muscle weakness in patients with myasthenia gravis and lead to life threatening breathing problems. Plaintiff contends this is exactly what happened with Mrs. Egeler. Defendants' theory of the case is that Mrs. Egeler's respiratory arrest was not caused by Ketek, but rather, an unexpected and unpredictable anaphylactic reaction that had nothing to do with her myasthenia gravis.

Defendants filed an affidavit of meritorious defense, which the trial court struck, finding it to be "grossly nonconforming" to the requirements imposed by MCL 600.2912e. As a sanction for defendants' noncompliance with the affidavit of meritorious defense statute, plaintiff moved for a default judgment against defendants. The trial court denied the motion, but elected to prohibit defendants from calling any retained independent expert witnesses on the subject of liability or proximate cause at trial. Defendants filed an interlocutory application for leave to appeal the trial court's ruling, which this Court denied. *Egeler v Wylie*, unpublished order of the Court of Appeals, issued October 6, 2006 (Docket No. 272740). The case proceeded to trial in April 2007 and defendants were able to call as expert witnesses Dr. Wylie and his partner, Dr. O'Brien. The jury returned a verdict in favor of plaintiff.

Defendants appeal the trial court's refusal to grant a new trial after the Michigan Supreme Court issued its ruling in *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), a case issued after the trial in this case. In *Kirkaldy*, the Supreme Court held that dismissal of a plaintiff's case without prejudice, rather than with prejudice, is a proper remedy for a successful challenge to a plaintiff's affidavit of merit. *Id*. at 586. Defendants contend that the Supreme Court's lessening of the consequences imposed on a plaintiff for filing a nonconforming affidavit of merit makes the trial court's remedy for defendants' noncompliance in this case disproportionately harsh. Defendants also contend that they were denied a fair trial because plaintiff's counsel made improper remarks with respect to defendants not having any retained experts at trial. Further, defendants appeal the trial court's application and calculation of the higher tier non-economic damages cap, as well as the amount of its award for attorney fees and costs.

II. Affidavit of Meritorious Defense Statute and Sanctions for Noncompliance

Defendants first argue that the trial court ordered an overly harsh sanction for their allegedly nonconforming affidavit of meritorious defense, and that after the Michigan Supreme Court issued *Kirkaldy, supra*, the trial court should have granted a new trial. Defendants maintain that their affidavit of meritorious defense was not defective.

The proper interpretation and application of MCL 600.2912e are questions of law that we review de novo. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). We review a trial court's remedy or sanction for a failure to comply with the requirements of MCL 600.2912e and a trial court's decision on a motion for a new trial for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007); *Kowalski v Fiutowski*, 247 Mich App 156, 160, 166; 635 NW2d 502 (2001). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett, supra* at 158.

We first address the adequacy of defendants' affidavit of meritorious defense. In order to comply with the requirements of MCL 600.2912e, an affidavit of meritorious defense "shall contain a statement of each of the following:"

> (a) The factual basis for each defense to the claims made against the defendant in the complaint.
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> (b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
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> (c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.
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> (d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

Defendants' affidavit of meritorious defense contained the following information constituting defendants' attempt to satisfy the above requirements:

> 5. That based upon my review and knowledge of the standard of practice any and all care rendered by BRADFORD WYLIE, M.D., and CHELSEA AREA PRIMARY CARE, PLLC, in the instant case complied in all respects with the applicable standard of care.
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> 6. That the damages alleged are not proximately related to the allegations of malpractice set forth in the Complaint and Notice of Intent.

We hold that defendants' affidavit of meritorious defense is substantively devoid of the statutorily required content under MCL 600.2912e. It contains no facts at all, let alone any upon

which a defense may be based. It does not describe the standard of practice or care which defendants claim to be applicable under the circumstances of this case. It does not describe the manner in which defendants claim to have complied with the applicable standard of practice or care. It does not describe the manner in which defendants contend that plaintiff's injury or damage is not related to the care and treatment rendered by defendants. Defendants' affidavit provides no insight whatsoever into any valid defenses being put forth by defendants, and as such, it fails to meet the requirements and legislative intent of MCL 600.2912e.[1]

We next address the trial court's selection of a sanction for defendants' failure to file an affidavit of meritorious defense that complied with the requirements of MCL 600.2912e.[2] "In medical malpractice cases, the purpose of the affidavits is to identify valid claims and defenses meriting discovery." *Kowalski*, *supra* at 164. When a defendant fails to file a timely affidavit of meritorious defense, the trial court is authorized, but not required to, enter a default against the defendant. *Id*. Before granting a default, the trial court must consider the possibility of other remedies. *Id*. at 166. "In selecting a sanction both appropriate and effective in compelling compliance with the statute, the trial court may consider the reasons for defendants' delays, what other actions defendants took to apprise plaintiffs and the court of those reasons, any prejudice to plaintiffs resulting from the delays, and any other factors relevant to the determination." *Id*.

Unlike the situation in *Kowalski*, where the defendants failed to timely file an affidavit of meritorious defense, defendants in this case filed their affidavit on time. The affidavit failed, however, to identify *any* valid defenses being put forth by defendants. In order to ascertain the validity of the allegations being made, the "the cooperation of both parties is necessary." *Id*. at 165. "While the focus in the past has been on the intent of the Legislature to prevent plaintiffs from bringing frivolous claims, the language of the statute is equally strict in requiring *defendants* to present a valid defense." *Id*. at 166.

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[1] In defending their affidavit of meritorious defense in the trial court, defendants argued that they needed time to conduct discovery. Pursuant to MCL 600.2912b, however, defendants were given a 182-day time period after plaintiff filed his notice of intent to file a claim to investigate the case and explore potential defenses. During this time period, defendants were entitled to access all of Mrs. Egeler's pertinent medical records. MCL 600.2912f and MCL 600.2912b(5). Further, defendants were given an additional 91-day time period after plaintiff filed his affidavit of merit to prepare and file a conforming affidavit of meritorious defense. MCL 600.2912e(1). In all, defendants had nine months within which to ascertain whether they had any defenses in this case before being required to articulate them in an affidavit.

[2] MCL 600.2912e is silent in regard to what sanction is appropriate for a defendant's failure to comply with the content requirements of the statute. The statute "unambiguously does not require or recommend any particular sanction." *Kowalski*, *supra* at 162. This Court has held that the Legislature's removal of a sanction provision from the statute (for failure to comply with the 91-day filing requirement) when it was amended in 1993 means that the Legislature "intended to leave the determination of a proper remedy to the discretion of the Court." *Id*. at 161-163.

The trial court ruled that defendants' affidavit of meritorious defense was "grossly nonconforming" of the requirements imposed by MCL 600.2912e. At the July 7, 2006 hearing on plaintiff's motion for a default judgment, the trial court appeared to initially grant the motion. The court stated that "what is good for the goose is good for the gander," referencing what it deemed to be rather draconian sanctions imposed upon plaintiffs for failure to comply with medical negligence laws. In its July 19, 2006 order, however, the trial court specifically denied plaintiff's request for a default. Instead, stating that it was exercising its discretion in selecting an appropriate sanction for defendants' filing a grossly nonconforming affidavit of meritorious defense, the trial court barred defendants from calling any retained independent expert witnesses on the subjects of liability or proximate cause.

Under the circumstances of this case, we hold that the trial court did not abuse its discretion in barring defendants from calling any retained independent experts as a sanction for filing a grossly nonconforming affidavit of meritorious defense. Defendants' affidavit failed to identify any valid claims or defenses meriting discovery. At no point prior to or at the time of plaintiff's motion to strike defendants' affidavit of meritorious defense did defendants seek to file a conforming affidavit or offer one for consideration by the trial court. Before that, defendants never filed a written response to plaintiff's notice of intent as required by MCL 600.2912b(7) to explain the factual bases for their defense, the manner in which they complied with the standard of care, and the manner in which they contend their care was not the proximate cause of plaintiff's alleged injuries. Defendants' affirmative defenses were stricken because defendants failed to substantiate them with any factual bases despite plaintiff's sending interrogatories seeking such information. At the time the trial court made its decision as to sanctions, it knew that plaintiffs could have their cases dismissed with prejudice if they filed a nonconforming affidavit of merit.[3] The trial court nevertheless chose a lesser sanction than default, and allowed defendants to present a defense, albeit without retained liability and proximate cause experts. Defendants were able to cross examine plaintiff's experts, attempt to impeach the experts using learned medical treatises, attack plaintiff's theories of liability and proximate cause, solicit expert opinion testimony from Dr. Wylie and Dr. O'Brien, and call damage experts and lay witnesses. They were in all other respects able to defend the case at trial. The trial court's sanction was appropriate under the circumstances of this case.

Defendants also contend that the trial court abused its discretion in refusing to grant a new trial after the Supreme Court issued *Kirkaldy*, *supra*. *Kirkaldy* overruled decisions of this Court dismissing plaintiffs' cases with prejudice for filing defective affidavits of merit. Defendants argue that the trial court's sanction, in light of *Kirkaldy*, was overly harsh, and thus, they are entitled to a new trial. As this Court has noted, however, "defendants in a medical malpractice case are not in the same situation as plaintiffs." *Kowalski*, *supra* at 165. A defendant's interest in prolonging the suit is very different from a plaintiff's need to meet the statutory deadline. Even when a plaintiff's case is dismissed without prejudice, the statute of

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[3] *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003) and *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003) were overruled by *Kirkaldy*, *supra*, in July 2007.

limitations is reactivated, leaving the plaintiff with potentially very little or no time to correct the defect. Furthermore, there is no clear alternative lesser sanction to the sanction ordered in this case.[4] Simply providing a defendant additional time to correct a defective affidavit of meritorious defense would do nothing to compel compliance with MCL 600.2912e. In fact, it would be to a defendant's benefit to file a nonconforming affidavit. The trial court properly denied defendants' motion for a new trial.

III. Plaintiff Counsel's Reference to Defendants' Lack of Retained Experts at Trial

Defendants next argue that they were denied a fair trial because plaintiff's counsel took advantage of their inability to call retained independent expert witnesses by arguing that the case was "medically indefensible" and implying that it was for that reason that no expert besides Dr. Wylie and Dr. O'Brien testified on defendants' behalf. We disagree.

Defendants failed to raise this issue before the trial court. This Court has set forth the following rules for reviewing unpreserved claims of attorney misconduct:

> [I]n a civil case in which a party assigns as error on appeal remarks of counsel during closing arguments, but fails to object to those remarks at trial, the party must prove that (1) the remarks were so prejudicial as to have denied the party a fair trial and that (2) any resulting prejudice could not have been cured by a curative instruction. This basis for appeal should be used sparingly . . . . [*Badiee v Brighton Area Schools*, 265 Mich App 343, 373-374; 695 NW2d 521 (2005) (citations omitted).]

An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial jury, or deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402 (2003). Instruction by a trial court to the jury before opening statements and following closing arguments that the statements of counsel are not evidence is generally sufficient to cure any prejudice which might arise from remarks by counsel that are improper. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001).

We find that plaintiff counsel's statements, viewed in context, were not improper. During opening statements, plaintiff counsel stated:

> The burden of proof is more likely than not. Is the evidence on one side more likely. Are we more likely right or is Dr. Wylie more likely right. And, Dr. Wylie, frankly, has this theory that it was something other than Ketek. It was a condition other than myasthenia that caused her death, but he's the only one. He will not present an expert. He will not present to you a neurologist. He will not

[4] Defendants' suggestion that the trial court could have permitted defendants to call causation experts is arbitrary and was not suggested before trial.

present to you anyone who knows anything about myasthenia. It is his theory and his alone.

During closing arguments, plaintiff counsel further stated:

> This is medically indefensible. It is indefensible which is why the only person who rose to the defense is Dr. Wylie and his former boss. This could be presented at a meeting of the American Society of Internist, and Dr. Wylie could get up in front of that group and he could say there's just too much information about medicine out there I can't possibly be expected to know the warnings. And, they would drop their jaws. They would drop their jaws at that. That's not what the specialty of internal medicine is about.
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> We've all come into contact with warnings whether it's a household product. I'm going to use a little bit of levity . . . .
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> Exacerbations have been reported within a few hours. It includes life threatening acute respiratory failure with rapid onset in patients with myasthenia gravis treated for respiratory tract infections. This describes Mrs. Egeler. It's got her name on it. It's not recommended to patients with myasthenia unless no other therapeutic alternative is available. Well, Dr. Wylie finally had to acknowledge that there are therapeutic alternatives and he violated this warning. And, so he has to say I didn't know about it and I couldn't possibly be expected to know about it. Because if you look at this in the warning he breached that.
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> All the time that [defense counsel] was speaking he was reading a deposition about this and a deposition about that, but when you get to the heart of the case there was no more defense in the opening statement than there was in any of their testimony or proofs. There was no physician who came and said this was defensible aside from Dr. Wylie and maybe his former boss. And, I say maybe because it was pretty equivocal he'd of never given this medication.
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> The only person who says or thinks that she was anaphylactic is Dr. Wylie. That wasn't the thought process of the physicians at Chelsea Hospital at the time she was there when she passed away. And, apparently it's not the thought process of any other learned physician that's been called here. And, I go back that it doesn't make one bit of difference. . . . The question is should he have given her that Ketek.

Defendants argue that plaintiff counsel's statements that Dr. Wylie's theory of the case was "his theory and his alone," that no experts, other than possibly Dr. O'Brien, would support his theory, and that defendants' case was "medically indefensible," were improper because defendants would have called additional expert witnesses to testify, but for the trial court's order barring them from doing so. Viewing counsel's statements in context, however, there is no

indication that he engaged in a deliberate course of conduct aimed at preventing a fair trial or deflecting the jury's attention from the issues involved. See *Hunter*, *supra* at 95; *Wiley*, *supra* at 501-502. Throughout his opening statement and closing argument, counsel repeatedly asked the jury to follow the trial court's instructions and weigh the evidence presented by each side. Counsel highlighted for the jury the weaknesses in Dr. Wylie's testimony–particularly his theory about the cause of death and that physicians are not required to know the published warnings associated with medications before prescribing them–and that no experts, other than possibly Dr. O'Brien, would support his testimony in that regard. There was no impropriety in pointing out the lack of evidence supporting defendants' case, even the lack of expert witness testimony. See, e.g., *Watkins v Manchester*, 220 Mich App 337, 339-340; 559 NW2d 81 (1996) (holding that it was not improper to refer to the opposing party's failure to call an expert witness where the court refused to allow the expert to testify).

Further, even if we found that plaintiff counsel's statements were improper, defendants cannot establish that the statements denied them a fair trial. The statements to which defendants now object were neither egregious nor repetitive. Counsel made the statements during a lengthy opening statement and closing argument, and there is no evidence that those isolated statements were so prejudicial that they denied defendants a fair trial. Moreover, the trial court instructed the jury that attorneys' statements are not evidence and that the jury should decide the case based solely on the evidence. The court's instructions were sufficient to cure any prejudice that may have arisen from counsel's statements. Therefore, even if the statements were improper, defendants would not be entitled to a new trial. See *Badiee*, *supra* at 373-374; *Tobin*, *supra* at 641.

IV. Non-Economic Damages Cap

Next, defendants argue that the trial court erred in applying the higher tier non-economic damages cap under MCL 600.1483. According to defendants, the trial court should have imposed the lower cap in effect when the complaint was filed and apportioned the non-economic damages awarded by the jury between past and future damages.

The proper interpretation and application of a statute presents a question of law reviewed de novo on appeal. *Ross v Auto Club Group*, 481 Mich 1, 6; 748 NW2d 552 (2008). A trial court's underlying findings of fact are reviewed for clear error. *Id*. A finding is clearly erroneous if after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

Defendants first argue that the trial court erred in applying the higher tier non-economic damages cap under MCL 600.1483. The trial court determined that the higher cap applied in this case because Mrs. Egeler suffered permanently impaired cognitive capacity before she died. MCL 600.1483 contains two caps on noneconomic damages and provides, in part:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant

to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

* * *

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

In *Young v Nandi*, 276 Mich App 67; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008), this Court interpreted and applied MCL 600.1483, stating in part:

> In summary, whether the lower or the higher noneconomic damages cap applies in a given case depends on the facts. As in any action for damages alleging medical malpractice, to recover noneconomic damages in excess of $280,000 the injured party had to suffer a qualifying injury and, in a wrongful death case, the qualifying injury had to occur before death.
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> [U]nder MCL 600.1483(1), even if a jury trial is conducted, the trial court determines whether one of these unique elements of damage exists as a result of a defendant's medical malpractice and, thus, entitles a plaintiff to the higher cap. So, the trial court is the finder of fact with regard to these unique elements of damage. . . . [D]efendants have failed to persuade us to conclude that expert testimony is necessary to establish that a qualifying injury under MCL 600.1483(1) was sustained.
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> [T]he meaning of "permanently impaired cognitive capacity" includes damage to or diminishment of one's mental ability to perceive, memorize, judge, or reason that is expected to last forever. Turning back to MCL 600.1483(1)(b), to establish this qualifying injury the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent "rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." *Id*. And, this permanently impaired cognitive capacity must be "the result of the negligence of 1 or more of the defendants . . . ." MCL 600.1483(1). [*Young*, *supra* at 75-77, 79-80.]

The *Young* Court found that the plaintiff in that case had failed to set forth any evidence establishing that the decedent, Patricia Young, suffered permanent damage to or diminishment of her mental abilities to perceive, memorize, judge, or reason that rendered her "incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living" as a result of the negligence of the defendant doctors. *Id*. at 80. The Court concluded that although Young was on a ventilator and medically

sedated before her death, "the evidence did not suggest that Young suffered damage to or diminishment of her mental ability to perceive, memorize, judge, or reason that was expected to be permanent. For example, there was no evidence to suggest that, if Young had lived, she would have been incapable of making independent, responsible life decisions and that she would have been permanently incapable of performing the activities of normal, daily living."[5] *Id*. at 80-81. Accordingly, the Court reversed the trial court's award that was based on the higher tier non-economic damages cap under MCL 600.1483. *Id*. at 81.

We find that the facts of this case are distinguishable from those in *Young*, and that there was sufficient evidence to support a finding of permanently impaired cognitive capacity under MCL 600.1483(1)(b). On February 18, 2005, within a half hour of taking the antibiotic prescribed by Dr. Wylie, Mrs. Egeler collapsed. Mrs. Egeler's husband testified that when she collapsed, he felt she was "gone," with "no life in her." Paramedics resuscitated Mrs. Egeler just before arriving at the emergency room, but she never regained consciousness. Mrs. Egeler was placed on a ventilator and diagnosed with significant anoxic brain damage. Dr. Fugaro Steven testified that "almost from the time [Mrs. Egeler entered] the emergency room, she had irreversible lethal brain damage and brain injury." On February 19, 2005, a neurology consultant recommended "continuing life support for at least another 48 hours" given that "typically, people who are going to show significant improvement will have limb movement at that time." Mrs. Egeler remained unresponsive and ventilator dependant for the next nine days. On February 27, 2005, she was "terminally weaned" from the ventilator and she passed away. Clearly, in this case, Mrs. Egeler suffered brain damage rendering her incapable of making independent, responsible life decisions and performing the activities of normal, daily living. Furthermore, unlike the facts in *Young*, the evidence in this case established that Mrs. Egeler's impaired cognitive activity was permanent. Accordingly, we conclude that the trial court properly applied the higher tier non-economic damages cap under MCL 600.1483.[6]

Additionally, defendants argue that the trial court should have applied the damages cap in effect when the complaint was filed in 2006, rather than when the judgment was entered in 2007. We disagree. We agree with plaintiff that the plain language of MCL 600.1483, MCL 600.6304, and MCL 600.6098 supports the conclusion that the limitation on non-economic damages becomes effective only after a verdict is rendered and when damages are awarded. MCL 600.6304(5) provides that in medical malpractice actions, "the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483." MCL 600.6098(1) provides that judges presiding over a medical malpractice action "shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount

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[5] Young died as an alleged result of the gastroenterology defendants' failure to diagnose and treat her intestinal ischemia.

[6] Defendants' additional arguments for the application of the lower tier non-economic damages cap were rejected by this Court in *Young, supra*, and by the majority of our Supreme Court in *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004).

specified in section 1483." In *Jenkins v Patel*, 471 Mich 158, 172; 684 NW2d 346 (2004), our Supreme Court stated, "Only after the court or jury has, in its discretion, awarded damages as it considers fair and equitable does the court, pursuant to § 6304(5), apply the noneconomic damages cap of § 1483. This is made explicitly clear in § 6098(1)." It follows that if the limitations set forth in MCL 600.1483 may only be applied after the verdict in a case is rendered, the judge must apply the damages cap in effect at the time of judgment. Cf. *Wessels v Garden Way, Inc*, 263 Mich App 642; 689 NW2d 526 (2004).

Defendants further argue that the capped amount of non-economic damages should be apportioned between past and future damages in the same percentages as the jury's award.[7] But, there is no statutory authority requiring such apportionment. Defendants point us to MCL 600.6305(1), which requires that any verdict or judgment rendered by a trier of fact in a personal injury action include specific findings of any past or future economic or noneconomic damages. The jury verdict in this case did include those specific findings. We have no reason to conclude, however, that MCL 600.6305(1) requires the court to apportion the capped amount of non-economic damages between past and future damages in the same percentages as the jury's uncapped award. Additionally, we note that in MCL 600.6306(3), the Legislature specifically provided:

> If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

Although MCL 600.6306(3) is inapplicable here, it demonstrates that the Legislature has, in some circumstances, included provisions for apportioning the amount of damages to be deducted between past and future damages. No such provision appears in any of the statutes at issue here, and we will not read into a statute something that was not included by the Legislature. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003). For these reasons, defendants' argument must fail.

V. Assessment of Attorney Fees

Next, defendants argue that the attorney fees awarded to plaintiff were excessive. Defendants do not dispute that plaintiff was entitled to case evaluation sanctions under MCR 2.403(O). Under MCR 2.403(O)(1), defendants must pay plaintiff's "actual costs." "Actual costs" include "a reasonable attorney fee based on a reasonable hourly or daily rate as

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[7] The jury awarded $500,000 for past non-economic damages and $75,000 per year for ten years ($750,000) for future non-economic damages. The trial court entered a judgment of $500,000 for past non-economic damages and $204,000 for future non-economic damages, a reduction from the jury's award of future non-economic damages in order to comply with the statutory cap applicable in 2007.

determined by the trial court for services necessitated by the rejection of case evaluation." MCR 2.403(O)(6)(b). Defendants argue instead that the hourly rate requested by plaintiff counsel was unreasonable and that plaintiff counsel failed to articulate, with sufficient specificity, the services rendered. We conclude, and plaintiff concedes, that a remand is necessary in light of *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), because the trial court failed to sufficiently articulate the reasons for its award of attorney fees. Therefore, we must vacate the award of attorney fees and remand to the trial court for further proceedings.

In reviewing an award of attorney fees, we review the trial court's underlying findings of fact for clear error. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). We review the trial court's decision whether to award attorney fees, and the reasonableness of the fees, for an abuse of discretion. *Id*.

In this case, the trial court awarded plaintiff $74,700 in attorney fees, based on 166 hours of labor, including 91.5 hours of "trial prep," at $450 per hour. In finding that $450 was a reasonable hourly rate, the trial court judge stated, in part, "I don't know of a more treacherous area in the law [than medical malpractice];" "I think that all of you should have $1,000 dollars an hour for the work that you have to do;" "I think I need to set the rate based on the fact that I've been on the Bench 16 years;" and "I've never seen better attorneys on both sides than I did in this case." In approving the 166 hours billed by plaintiff attorney, the trial court made no specific finding of reasonableness. When defendants objected to the 91.5 hours of "trial prep" listed on plaintiff attorney's billing records, the trial court judge simply stated, "If these lawyers came up and told me, Judge, this is how much I spent and here is what I did. I'd believe them."

Our Supreme Court recently addressed the proper method for determining an award of attorney fees. In *Smith*, *supra* at 530-531, 537, the Supreme Court held that a trial court must first determine the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence, then multiply the rate by the reasonable number of hours expended, and then make any necessary upward or downward adjustments in light of the remaining factors in *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573; 321 NW2d 653 (1982),[8] and Rule 1.5(a) of the Michigan Rules of Professional Conduct,[9] with at least a brief articulation of its view of each factor. The *Smith* Court further

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[8] *Wood* provides that when determining a reasonable attorney fee, a court should consider: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood*, *supra* at 588 (internal quotations and citations omitted).

[9] MRPC 1.5(a) provides that when determining a reasonable attorney fee, a court should consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(continued…)

held that in considering the time and labor involved, the trial court must determine the reasonable number of hours expended by each attorney. *Smith*, *supra* at 532.

> The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence. [*Id*.]

With respect to the specificity required in billing records, this Court in *Young*, *supra,* concluded that the phrases, "trial prep" and "trial" in billing records are self-explanatory:

> [I]n order for the trial court to arrive at a reasonable attorney fee award, it must determine what services were actually rendered. Although a detailed bill of costs is not required, some documentation is needed to enable the trial court to determine the proper amount to award. . . .
>
> Although plaintiff's counsel did not list exactly what she was doing with regard to her "trial" and "trial prep" submissions . . . lawyers generally know what other lawyers do during "trial" and "trial prep" –review the pleadings, review discovery responses, read depositions, prepare experts, prepare lay witnesses, prepare cross-examinations, prepare opening and closing arguments, prepare exhibits, attend the trial, and so forth. The list is quite extensive but well known, i.e., there are no surprises. Therefore, an evidentiary hearing was properly denied as unnecessary. It would be unreasonable to force lawyers, who do not even know if they will be entitled to case evaluation sanctions at the time they are preparing for and attending trial, to record exactly what they were doing at every "billable" moment. And, it is unnecessary. The trial court can certainly consider the type of case, the length of the trial, the difficulty of the case, the numbers and types of witnesses, as well as other relevant factors, and determine what services were necessitated by the rejection of the case evaluation. We refuse to require an

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(…continued)

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

exhaustive and detailed list of the precise service provided at every moment. *Young*, *supra* at 88-89 (citation omitted).

Given the Supreme Court's holding in *Smith*, *supra*, that an evidentiary hearing is required whenever a factual dispute exists over the reasonableness of the hours billed or the hourly rate claimed by the fee applicant, the Supreme Court vacated part of this Court's ruling in *Young*, specifically, "only that part of the Court of Appeals judgment that held that the trial court properly denied the defendants' request for a hearing concerning attorney fees in the plaintiff's favor as case evaluation sanctions under MCR 2.403(O)(6)(b)." *Young v Nandi*, 482 Mich 1007; 759 NW2d 351 (2008). Under the facts of that case, such hearing was deemed necessary. *Id*.

In light of the Supreme Court's holding in *Smith*, *supra*, the trial court in this case failed to sufficiently articulate its reasons for the amount of the award of attorney fees. Accordingly, we must vacate the award of attorney fess and remand this case to the trial court to make specific findings consistent with *Smith*, *supra*, and hold an evidentiary hearing if the evidence of record is insufficient to make a proper finding of reasonableness. The trial court must determine the fee customarily charged in the locality for similar services based on reliable surveys or other credible evidence of the legal market,[10] make a finding based on evidentiary support as to the reasonable number of hours expended by plaintiff's counsel, and multiply those two figures in order to determine the starting point for calculating a reasonable attorney fee. The trial court should then consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate, and briefly discuss its view of the remaining factors. *Smith*, *supra* at 530-531.

VI. Assessment of Costs

Finally, defendants argue that the trial court erred in awarding plaintiff various expenses billed as costs of litigation. We agree with defendants that the trial court's award of costs for procuring medical records, case evaluation fees, transcript fees, postage, and a portion of plaintiff's expert witness fees was improper. Therefore, we must vacate the award of costs and remand to the trial court for further proceedings.

As indicated above, under MCR 2.403(O)(1), defendants must pay plaintiff's "actual costs" as case evaluation sanctions. "Actual costs" include the costs taxable in any civil action. MCR 2.403(O)(6)(a). "The power to tax costs is wholly statutory. Therefore, costs are not recoverable where there is no statutory authority for awarding them." *Portelli v IR Constr Products Co*, 218 Mich App 591, 605; 554 NW2d 591 (1996) (citations omitted). The proper interpretation and application of court rules and statutes involve questions of law reviewed de novo on appeal. *Dessart v Burak*, 470 Mich 37, 39; 678 NW2d 615 (2004); *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003). We review the amount of sanctions imposed by the trial court for an abuse of discretion. *Campbell*, *supra* at 197.

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[10] "The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. 'The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.'" *Smith*, *supra* at 531 (internal quotation and citation omitted).

In this case, plaintiff requested and the trial court awarded $42,652.25 in taxable costs. Defendants first argue and plaintiff concedes that there is no statutory authority allowing costs for procuring medical records, case evaluation fees, and postage. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 622-623; 550 NW2d 580 (1996); *JC Bldg Corp v Parkhurst Homes*, 217 Mich App 421, 429; 552 NW2d 466 (1996). The award of costs for those items was improper. Defendants also argue that there is no statutory authority allowing fees for transcripts that were never read into the record. MCL 600.2549 provides that costs for certain depositions and certified documents or papers may be allowed in the taxation of costs. It states that:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

The trial court awarded plaintiff costs for Dr. Wylie's deposition, but his deposition was not read into evidence or "necessarily used," as required by MCL 600.2549. The court also awarded plaintiff costs for transcribing defendants' opening statement at trial. While trial transcripts are taxable costs in an appeal, MCL 600.2543 and MCR 7.219(F)(3), it is inappropriate to include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party in a civil action. Cf. *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991). The award of costs for those items was also improper.

Additionally, defendants challenge the trial court's award of expert witness fees. Defendants do not dispute that expert witness fees are taxable costs under MCL 600.2164. *Elia v Hazen*, 242 Mich App 374, 379; 619 NW2d 1 (2000). MCL 600.2164 provides, in part:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case.

Although a trial court has the discretion under MCL 600.2164 to authorize expert witness fees for court time as well as for the time spent preparing to testify, *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989), "an expert is not automatically entitled to compensation for all services rendered," *Hartland v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991). Specifically, this Court has rejected the idea that "conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position" are compensable as expert witness fees. *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). Additionally, MCL 600.2164 permits taxation of expert witness fees only for a witness who "is to appear, or has appeared," before the court. Fees for witnesses who did not testify at trial (or if their deposition is not read at trial) are not taxable. *Put v FKI Industries, Inc*, 222 Mich App 565, 573; 564 NW2d 184 (1997); *Portelli*, *supra* at 605.

Plaintiff requested expert witness fees for four experts who did not testify at trial, including one expert simply called "Health systems; expert" on plaintiff's bill of costs. Because those experts did not testify at trial (and their depositions were not read at trial), those fees were

not compensable under MCL 600.2164, and the trial court erred in awarding them. Plaintiff also requested expert witness fees for three experts who did testify at trial and for one whose deposition was read at trial. Defendants concede that plaintiff is entitled to at least a portion of those fees under MCL 600.2164, but it is impossible to determine from the record how much time was appropriately charged as preparation fees or fees for time in court. Plaintiff failed to provide any documentation supporting the amount of expert witness fees requested, such as itemized bills, until the day of the hearing on plaintiff's motion for costs. The trial court made no specific findings regarding the documentation and defendants were not permitted to review it.

Because the trial court erred in awarding plaintiff costs for procuring medical records, case evaluation fees, transcript fees, postage, and expert witness fees for experts who did not testify at trial, and because it is impossible to determine whether the remainder of the expert witness fees were proper, we must vacate the award of costs and remand to the trial court for further proceedings. On remand, the trial court must determine the amount of expert witness fees that is properly compensable, articulating its specific findings on the record, and enter an award of costs consistent with this opinion.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering